Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MOTORS CORPORATION,
Petitioner,

v.

VALORIE LYNN GREAR AND PAUL C. NORDBERG,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a circuit court of appeals is jurisdictionally barred from hearing an appeal from a trial court order compelling the disclosure of privileged communications, or whether such an appeal properly comes within the "collateral order" doctrine laid down by the Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

2. Whether a circuit court of appeals is jurisdictionally barred from reviewing a petition for mandamus taken from a trial court order compelling the disclosure of privileged communications because a party is obliged to disobey the order and go into contempt before it can seek any review on the merits?

PARTIES TO THE PROCEEDING

Petitioner General Motors Corporation is a defendant in this case and was both the appellant below and the real party in interest in the separate proceeding on its petition for mandamus. Karol R. Vernon and Vernbrook, Inc., were also named as defendants. Pursuant to Supreme Court Rule 29.6, General Motors advises the Court that the following is a list of General Motors' non-wholly-owned subsidiaries as reported to the Securities and Exchange Commission in Exhibit 21 to General Motors' Form 10-K Annual Report for the year ended December 21, 1996:

Asset Leasing GmbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH

Polbank, S.A.
P.T. GMAC Lippo Finance
General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co., Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in the following entities:

American Mobile Satellite Corp.
Detroit Diesel Corp.
Fiem Sung San (India) Limited
GMFanuc Robotics Corp.
Isuzu Motors Limited
Motor Enterprises, Inc.
New United Manufacturing, Inc.
Nippon Avionics Co., Limited
PanAmSat Corp.
Suzuki Motor Corp.

Valorie Lynn Grear and her husband, Paul C. Nordberg, are the plaintiffs in this case, having brought this suit in their individual capacities, and were appellees and respondents

below. The Honorable Julia Smith Gibbons of the United States District Court for the Western District of Tennessee, who serves as the trial judge in this case, was named as a respondent in the petition for mandamus filed below.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioner respectfully petitions for a writ of *certiorari* to review the orders entered by the United States Court of Appeals for the Sixth Circuit in this proceeding.

The Sixth Circuit's twin rulings -- which held that a court of appeals lacks jurisdiction to entertain either an interlocutory appeal or a petition for writ of mandamus challenging a trial court order compelling the disclosure of privileged communications -- create a three-way circuit split and impose an undue burden on litigants seeking to protect privileged documents. Every other circuit to have addressed the issue has

concluded that parties have one or both of these avenues of review available to challenge a trial court's compelled disclosure of documents or other communications protected by the attorney-client privilege and work product doctrine. By requiring litigants to disobey orders compelling disclosure of privileged documents and go into contempt before seeking appellate review, the Sixth Circuit has effectively ordered district court bailiffs to guard the door to the court of appeals. This draconian rule -- which requires litigants to brave the threat of sweeping discovery sanctions, substantial fines, and permanent harm to reputation, before they would be authorized even to seek appellate review -- would all but eliminate judicial protection of "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

OPINIONS BELOW

The District Court's order compelling the disclosure of privileged communications is unreported and is reprinted in the Appendix to this petition ("Pet. App.") at 10a. It affirmed a magistrate's order to the same effect that is reprinted at Pet. App. 1a-9a. In order to obtain review of the disclosure order, General Motors filed a notice of appeal and also petitioned for mandamus. The Court of Appeals initially granted a temporary stay of the disclosure order, *see id.* 12a, but later issued two related orders resolving the matter, from which this petition is taken. The first order dismissed the appeal, which was found to be barred on jurisdictional grounds, and dissolved the temporary stay. *See id.* 14a-15a. The second order denied the petition for mandamus, which was also found to be barred on jurisdictional grounds, and dissolved the temporary stay. *See id.* 16a-17a.

STATEMENT OF JURISDICTION

The Court of Appeals entered the orders under review here on September 17, 1997. *See* Pet. App. 14a; *see also id.* 16a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

28 U.S.C. § 1291 provides, in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court. . . .

28 U.S.C. § 1651(d) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE

A. The Task Force Memorandum.

The document whose privileged character is at issue between the parties here -- the so-called "Task Force Memorandum" -- is a ten-page confidential memorandum written in April 1990 by two General Motors in-house lawyers, Gary P. Toth and Douglas E. Brown, and addressed to a third in-house lawyer, James A. Durkin. At that time, Mr. Durkin was legal counsel to the senior committee that was responsible for advising the Corporation on technical issues. Mr. Toth was a principal legal advisor to General Motors' Automatic Restraint Task Force ("the Task Force"). The Task Force, which consisted of about a dozen engineers, was charged with providing the General Motors legal staff with information and engineering evaluations on the technical issues raised in connection with anticipated litigation involving General Motors' door-mounted restraint systems. *See* Pet. App. 24a-25a (Durkin Affidavit).

Early in 1990, Mr. Durkin asked Messrs. Toth and Brown to prepare a memorandum analyzing available technical information related to the use of automatic belt systems. They

responded to this request by producing the confidential Task Force Memorandum, with the anticipation that it would remain confidential and be used solely to provide legal advice and defend litigation claims against General Motors. Mr. Durkin forwarded the memorandum to a select few individuals at General Motors on a need-to-know basis, as analytical support for the legal advice he had provided them.

In order to remove any doubt about the indisputably privileged nature of the Task Force Memorandum, General Motors has provided it for *in camera* review by this Court, by lodging it as a separate sealed appendix accompanying this petition. *See* Appendix A (filed under seal).

B. The Trial Court Proceedings.

This dispute over the privileged character of the Task Force Memorandum arises from a products liability action. Plaintiff Valorie Grear sustained serious injuries as the result of a 1995 accident in her Buick Skylark. She and her husband filed this action against General Motors, alleging that the car's door-mounted passive restraint and door latch systems were defectively designed.

On February 10, 1997, plaintiffs served on General Motors a request to produce all documents relating to the meetings of and findings, conclusions, and studies of the Task Force. In addition, plaintiffs served on General Motors a First Set of Interrogatories, which requested, *inter alia*, that General Motors produce a privilege log for all documents that it had not produced in response to plaintiffs' requests. General Motors objected to this request on grounds of attorney-client privilege and the work product doctrine. In response to plaintiffs' request for a privilege log, General Motors stated that it would either provide a privilege log for the Task Force documents or provide them to the court for *in camera* inspection.

Dissatisfied with General Motors' responses -- including its assurance that it would produce either a privilege log or the Task Force documents for *in camera* review -- the plaintiffs moved to compel production of those documents. General

Motors immediately sought a protective order, explaining that it had declined to produce these documents -- including the Task Force Memorandum -- because they are privileged.

On May 22, 1997, General Motors submitted the privileged Task Force documents to the Court for *in camera* inspection, and withdrew the rest of its privilege claims. The next day, the parties discussed these documents at a settlement conference before the Magistrate Judge. Following that meeting, the Magistrate Judge ordered General Motors to produce a privilege log identifying the Task Force documents that remained undisclosed. Within a week, General Motors duly produced the requested privilege log, which listed and described, *inter alia*, the Task Force Memorandum. At the same time, General Motors submitted the privileged documents (including the Task Force Memorandum) under seal for *in camera* review.

C. The Trial Court Rulings.

In an Order dated July 7, 1997, the Magistrate Judge granted plaintiffs' Motion to Compel and denied General Motors' Motion for a Protective Order. *See* Pet. App. 9a. Significantly, the Magistrate Judge did *not* find that any of the then-undisclosed Task Force documents were not privileged; indeed, the Magistrate Judge refused even to review the privileged documents *in camera*. Instead, the Magistrate Judge granted the Motion to Compel because she determined that General Motors had "waived its asserted privileges . . . for failure to properly and timely describe the documents," even though General Motors has clearly and consistently reiterated its position that this specific document is protected by the attorney-client privilege. *Id.* 4a. The Magistrate Judge directed General Motors to produce the Task Force documents by July 15, 1997.

After granting an initial stay of the Magistrate Judge's ruling, the District Court ultimately affirmed the Magistrate Judge's order, stating only that "[t]he magistrate judge's ruling is not clearly erroneous or contrary to law." Pet. App. 10a. General Motors immediately appealed, petitioned for a writ of

mandamus, and moved for a stay pending review by the Sixth Circuit. The District Court denied the stay, but extended the deadline for producing the Task Force Memorandum to August 15, 1997. *Id.* 11a.

D. The Procedure Followed by the Court of Appeals.

On August 13, 1997, the Sixth Circuit issued an order that temporarily stayed the trial court order pending its disposition of the appeal and petition for mandamus filed by General Motors. Pet. App. 12a-13a.

In two orders entered on September 17, 1997, the Sixth Circuit: (1) granted plaintiffs' motion to dismiss; (2) denied General Motors' petition for writ of mandamus; and (3) dissolved the temporary stay. In denying both the appeal and the mandamus petition, the Sixth Circuit did not rule on the merits of either submission. Instead, it held that it lacked jurisdiction to entertain *either* an interlocutory appeal *or* a request for mandamus relief. In particular, the Sixth Circuit expressly rejected the recent decision by the Third Circuit in *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997), which had held that *both* avenues of relief are properly available to a party seeking to resist disclosure of documents protected by the attorney-client privilege, bluntly stating that "we decline to adopt the reasoning of that case." Pet. App. 15a. The Sixth Circuit held that "[a]lthough a direct appeal following final judgment is an inadequate remedy, GM can obtain appellate review by submitting to contempt and appealing the contempt ruling." *Id.* 16a-17a; *see also id.* 15a.

Upon receipt of these orders, General Motors moved in the Sixth Circuit for a stay of the mandate pursuant to Fed. R. App. P. 41(b), seeking temporary relief pending review by this Court. On October 3, 1997, the Sixth Circuit granted the motion for stay and gave General Motors time in which to prepare and file this petition for *certiorari*. Pet. App. 18a-19a.

REASONS FOR GRANTING THE WRIT

This petition cleanly presents a basic procedural issue of great importance to judicial administration in the federal courts,

on which there is a clear and irreconcilable three-way split among the circuit courts of appeals. The question presented is what mechanism shall be available to litigants in the federal courts to seek immediate relief from an order requiring the disclosure of documents that are protected by the attorney-client privilege. The Third Circuit has recently ruled that a party may take an interlocutory appeal in these circumstances under 28 U.S.C. § 1291, and that mandamus relief is also available pursuant to 28 U.S.C. § 1651 as an alternative means of obtaining immediate review. *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997).

In contrast, most courts do not permit an interlocutory appeal in those circumstances, but do permit a party to seek immediate relief by means of a petition for mandamus. *See, e.g., In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1387 (Fed. Cir. 1996), *cert. denied*, 117 S. Ct. 1484 (1997); *In re Bieter Co.*, 16 F.3d 929, 931 (8th Cir. 1994); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 163 (2d Cir. 1992); *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1490-92 (9th Cir. 1989); *In re Burlington Northern, Inc.*, 822 F.2d 518, 522 (5th Cir. 1987); *Jenkins v. Weinshienk*, 670 F.2d 915, 917 (10th Cir. 1982); *Rowley v. McMillan*, 502 F.2d 1326, 1335 (4th Cir. 1974); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd by equally divided Court*, 400 U.S. 348 (1971).

The Sixth Circuit, however, has now imposed a far more draconian rule, holding that in these circumstances a party may not appeal from the trial court order and also may not pursue mandamus relief -- indeed, that both avenues of relief are *barred* on jurisdictional grounds. *See* Pet. App.15a; *see also id.* 16a-17a. Instead, the Sixth Circuit has held that in order to obtain immediate review, a party must go into contempt of the trial court order and then seek to appeal from the imposition of contempt sanctions. Other circuit courts have squarely rejected this position, holding that forcing a party to engage in contumacious conduct is undesirable and creates the kind of irreparable harm that justifies immediate review on mandamus. *See, e.g., United States v. Hemphill*, 369 F.2d 539, 543 (4th Cir.

1966). Courts have also noted that sanctions imposed against a party are not subject to immediate appeal unless the trial court chooses to proceed by way of criminal contempt, rather than through civil coercive contempt or by imposing some form of discovery sanctions. *See, e.g., Admiral Ins. Co.*, 881 F.2d at 1490-92. Those courts have thus recognized that forcing a party to disobey the trial court's order and submit to sanctions offers no assurance that the party can avoid irreparable harm by pursuing an immediate appeal.

This three-way split among the circuit courts on an issue so basic to judicial administration and so critical to the preservation of the legally sacrosanct attorney-client privilege warrants review on the merits in this case.

I. THE DECISION BELOW RAISES IMPORTANT ISSUES OF APPELLATE JURISDICTION ON WHICH THE CIRCUITS ARE IN CONFLICT.

Whether a party to litigation has available some procedural avenue by which it can challenge an erroneous trial court order requiring disclosure of privileged communications is self-evidently an important issue of judicial administration. This issue arises frequently, and can affect almost any civil or criminal case filed in federal court. A circuit conflict on such an essential and ubiquitous issue demands immediate review by this Court, if for no other reason than simply to lay down a clear rule that can be applied uniformly by all of the lower federal courts and followed clearly by litigants. As this petition demonstrates, this procedural issue has generated a clear and irreconcilable three-way split among the circuit courts.

The Third Circuit has recently ruled that an appellate court has jurisdiction to review a party's interlocutory appeal in these circumstances, and that mandamus relief would also be available in the alternative. *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997). In a scholarly opinion by Judge Becker, the Court of Appeals undertook a careful review of the jurisdictional issues surrounding the possibility of an interlocutory appeal. After a close examination of the three prongs of the "collateral order" doctrine laid down by this

Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the court concluded that discovery orders compelling disclosure of privileged communications are subject to immediate appeal because they: (i) conclusively determine the disputed issue; (ii) resolve an important issue that is separate from the merits; and (iii) are effectively unreviewable on appeal from a final judgment. *See In re Ford Motor Co.*, 110 F.3d at 957-64.

The Third Circuit's holding that discovery orders compelling the disclosure of privileged communications are immediately appealable rests on a compelling analysis of the *Cohen* "collateral order" doctrine. As the court explained, the first and third prongs of the doctrine are obviously met, for the order "conclusively determines the disputed issue," *Id.* at 958, and in terms of protecting privileged communications from disclosure, the party is "irremediably disadvantaged by erroneous disclosure" because "the cat is already out of the bag," *id.* at 963. These conclusions are indisputable.

With respect to the second prong of the *Cohen* doctrine, the Third Circuit also was correct in holding that the issue of compelled disclosure of privileged communications is both separate from the merits of the underlying case and important enough to warrant immediate review. *Id.* at 958-62. On the issue of importance, in particular, the court held that "because of the imperative of preventing impairment of some institutionally significant status or relationship [here, the attorney-client relation], the danger of denying justice by reason of delay in appellate adjudication outweighed the inefficiencies flowing from interlocutory appeal." *Id.* at 960. The court so concluded after weighing the importance of the attorney-client privilege, which it recognized is "at the heart of the adversary system," and indeed "is one of the pillars that supports the edifice that is our adversary system." *Id.* at 961-62. The court's analysis thus mirrors this Court's own statements about the sacrosanct character of the privilege, which ensures the "observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389.

In addition, the Third Circuit went on to emphasize that even "if we did not have appellate jurisdiction, we would have mandamus jurisdiction to review" such orders. *In re Ford Motor Co.*, 110 F.3d at 962. In reaching this conclusion, the court rejected the practicality of later review of this category of trial court orders, holding that "there is no effective means of reviewing after a final judgment an order requiring the production of putatively protected material." *Id.* at 964. (It bears emphasis here that this statement by the court speaks to the efficacy *both* of immediate appellate review *and* discretionary mandamus review.) In the end, the court decided that it would be preferable to review such orders on direct appeal under the "collateral order" doctrine because mandamus review is more limited, and affords "less opportunity to provide guidance for future cases." *Id.* But under the Third Circuit's approach, a party may seek immediate review of such orders by utilizing either mechanism.

In contrast, most courts have not permitted an interlocutory appeal in those circumstances. *See, e.g., Texaco, Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 43-44 & n.4 (5th Cir. 1993); *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993). Yet those same courts do permit a party to seek immediate relief by means of a petition for mandamus. *See, e.g., In re Burlington Northern*, 822 F.2d at 522 (Fifth Circuit holds that mandamus is appropriate to protect claims of privilege); *Jenkins*, 670 F.2d at 917 (Tenth Circuit holds the same). Virtually every other circuit court likewise allows mandamus review: the Federal Circuit, *see, e.g., In re Regents of Univ. of Cal.*, 101 F.3d at 1387 ("writ of mandamus may be sought to prevent the wrongful exposure of privileged communications"); the Eighth Circuit, *see, e.g., In re Bieter Co.*, 16 F.3d at 931-32 (mandamus authorized because attorney-client privilege "has substantial importance to the administration of justice" and "an appeal after disclosure of the privileged communication is an inadequate remedy"); the Second Circuit, *see, e.g., Chase Manhattan*, 964 F.2d at 163 (granting mandamus relief because later appeal is an inadequate remedy to protect valid claims of privilege); the Ninth Circuit,

see, e.g., Admiral Ins. Co., 881 F.2d at 1490-92 (same); the Fourth Circuit, *see, e.g., Rowley*, 502 F.2d at 1335 (mandamus is appropriate to protect claim of privilege because appeal from either a final judgment or a contempt citation would be inadequate); and the Seventh Circuit, *see, e.g., Harper & Row*, 423 F.2d at 492 (appellate review after disclosure of attorney-client privileged information is inadequate and mandamus is proper).

This great weight of authority reflects the view, embraced by the vast majority of lower federal courts, that a mechanism must be kept available to permit some form of immediate review of trial court orders requiring the disclosure of privileged communications. Accordingly, even if the Third Circuit's conclusions on the applicability of the *Cohen* doctrine were judged to be incorrect for some reason, its alternative holding that mandamus review is available in these circumstances is surely correct. This holding is in agreement with every other circuit court that has considered the issue -- except for the Sixth Circuit.

The Sixth Circuit has now imposed a rigid rule that in these circumstances a party may not appeal from the trial court order and also may not pursue mandamus relief. *See* Pet. App. 14a-15a; *see also id.* 16a-17a. Instead, a party will be forced to go into contempt of the trial court order and then seek to appeal from the imposition of contempt sanctions in order to vindicate its claim of privilege. *See id.* 15a; *see also id.* 16a-17a. Indeed, the Sixth Circuit has held that in this situation it has jurisdiction to consider *neither* an appeal *nor* a petition for mandamus -- an approach that disagrees with the position taken by every other circuit court of appeals.

Thus, the Sixth Circuit has simply rejected the analysis that undergirds the overwhelming body of precedent from the other circuit courts. Once again, the principal foundation for all of those other decisions is the inadequacy of alternative remedies, such as appeal after a final judgment or possible (though not certain) appeal from any imposition of contempt sanctions. *See, e.g., In re Bieter Co.*, 16 F.3d at 931 (mandamus review

appropriate due to "inadequacy of later review as a remedy"); *Chase Manhattan*, 964 F.2d at 163 (granting mandamus relief because "the privilege will be lost in the particular case if review must await a final judgment"); *Admiral Ins. Co.*, 881 F.2d at 1490-92 (granting mandamus relief because irreparable harm can result from forced disclosure of privileged material and civil contempt sanctions are not subject to immediate appeal); *Jenkins*, 670 F.2d at 917 (where privileged information is ordered to be disclosed, "appeal after a final decision is an inadequate remedy; in these circumstances, an appellate court may exercise its mandamus power"); *Rowley*, 502 F.2d at 1335 (mandamus is appropriate where a party's only other avenue for review of an order compelling disclosure of privileged information is to appeal from entry of a contempt citation). The Sixth Circuit's position, and the essential legal analysis upon which it rests, is simply irreconcilable with this overwhelming body of decisions by the other courts of appeals.

This three-way split among the circuit courts on an issue so basic to federal litigation and to preservation of the legally sacred attorney-client privilege is untenable as a matter of sound judicial administration. The issue is cleanly presented in this case, and review is warranted to resolve the conflict and lay down clear guidance for the lower federal trial courts and appellate courts.

II. THE SIXTH CIRCUIT'S APPROACH ERECTS UNDULY SEVERE HURDLES TO PROTECTING THE ATTORNEY-CLIENT PRIVILEGE.

A. Effective Elimination of Mandamus Review.

The uniquely oppressive approach embraced by the Sixth Circuit poses severe obstacles to appellate review of orders that threaten the vital interests protected by the longstanding doctrine of attorney-client privilege. In particular, the Sixth Circuit's approach would eliminate direct mandamus review as a necessary tool that is available to protect the attorney-client privilege. It thus clashes with this Court's decisions, which have stressed that mandamus review provides a logical method -- and at times an essential method -- by which to supervise

important issues concerning the administration of justice in the lower courts. *See, e.g., Will v. United States*, 389 U.S. 90, 107 (1967); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957). To the extent that the Court has cautioned that mandamus should not be used as "a substitute for an appeal," *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), this caveat is amply addressed by limiting discretionary review in mandamus only to important questions of law, where guidance would be especially useful to the administration of justice in the lower courts, and as an escape hatch to the rigors of the finality rule, *id.* at 110-112.

The Sixth Circuit, however, has now held that even the mere possibility of such mandamus review *is jurisdictionally barred* and that a party instead must flout trial court orders and incur contempt sanctions before review can be sought to vindicate a valid claim of attorney-client privilege. *See* Pet. App. 15a; *see also id.* 16a-17a. By placing the unavailability of mandamus review on jurisdictional grounds, the Sixth Circuit's approach would clearly circumscribe the necessary use of the writ and indeed would effectively eliminate it as an option for courts and litigants in these circumstances.

Moreover, the Sixth Circuit's erroneous conclusion that it is barred on jurisdictional grounds from *even considering* whether to grant mandamus relief is particularly troublesome in this case, given the substantial importance of the underlying substantive issues raised in General Motors' mandamus petition. The District Court's order compelling the disclosure of privileged communications raises unsettled questions about the extent to which an extra-textual requirement to create a privilege log can properly be imported into Rule 26 of the Federal Rules of Civil Procedure. On its face, the Rule contains no such rigid requirement; instead, it merely requires a party raising a privilege objection to "make the claim expressly" and to "describe the nature of the documents" sufficiently to "enable other parties to assess the applicability of the privilege." *See* Fed. R. Civ. P. 26(b)(5). On the facts of this case, it is plain that General Motors complied with the absolute letter and spirit of this Rule; yet the Sixth Circuit has

erected unduly severe hurdles to parties like General Motors who simply seek to vindicate the legitimate claims of privilege traditionally afforded them.

B. The Fatal Flaw in the Sixth Circuit's Analysis: A Party Cannot Simply Opt for Criminal Contempt.

Even on its own terms, the Sixth Circuit's approach is inherently flawed. The Court of Appeals recognized that where the sanctity of privileged communications is at stake, "a direct appeal following final judgment is an inadequate remedy." Pet. App. 16a-17a. Nonetheless, it held that litigants are jurisdictionally barred from obtaining immediate review of such orders either by appeal or by mandamus, and must instead "obtain appellate review by submitting to contempt and appealing the contempt ruling." *Id.* This prescription, however, overlooks the fact that even if a party were to follow this suggestion and deliberately disobey a discovery order requiring it to disclose privileged communications, the trial court may decide to proceed by way of coercive civil contempt or by imposing discovery sanctions, neither of which can be appealed by a party until a final judgment has been entered. *See, e.g., Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) (party may not take an immediate appeal from civil contempt sanctions); *Lamar Fin. Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990) (same); *Admiral Ins. Co.*, 881 F.2d at 1491 (same); *R.R. Donnelley & Sons Co. v. F.T.C.*, 931 F.2d 430, 431 (7th Cir. 1991) (discovery sanctions not appealable until after final judgment).

Thus, even on its own terms, the Sixth Circuit's approach provides no assurance that a party will be able to seek to vindicate its lawful privileges in any meaningful way, even after it has been forced to assume an unappetizing and unwelcome posture of judicial intransigence. If a party is obliged to follow the rule now embraced by the Sixth Circuit, it will be barred from obtaining any immediate review of a trial court order compelling the disclosure of privileged communications until it first disobeys that order and risks being held in contempt. If, at that juncture, the trial court decides to

respond to this flouting of its order by imposing civil contempt sanctions -- such as daily fines or continued imprisonment until the party submits to these coercive measures and discloses the privileged communications -- the intransigent party cannot obtain any immediate review of these sanctions at all. If, instead, the trial court decides to respond by imposing discovery sanctions or even defaulting the noncomplying party, then once again no review can be had at all -- either through an appeal or by way of mandamus -- until a final judgment has been entered in the case. But even the Sixth Circuit recognized that this situation is untenable, because "a direct appeal following final judgment is an inadequate remedy" to protect the attorney-client privilege. Pet. App. 16a-17a. Indeed, *only* if the trial court chose to proceed by imposing criminal contempt sanctions would the Sixth Circuit be correct in its blithe assumption that the noncomplying party will be able to seek immediate review to vindicate its lawful claim of privilege.

C. Forcing Parties into Contempt Is Unsatisfactory.

The Sixth Circuit's approach also is an utterly unsatisfactory means of ensuring effective judicial management. It treats casually the prospect that in many cases, litigants will be forced to engage in contumacious conduct in order to correct an erroneous ruling and vindicate their clear legal rights. Indeed, the Sixth Circuit's approach emphatically *requires* litigants to disobey trial court orders and go into contempt of those orders before they can seek to vindicate their rights and the legal privileges afforded them by law. This cynical approach breeds unwelcome disrespect for legal authority. And it ignores or underestimates the frictions and intransigence that this regime would build into the administration of justice in the trial courts. As such, it is inconsistent with this Court's recognition that where the only alternatives to compliance with an order "would risk serious criminal and civil penalties," it is appropriate to permit judicial review of a party's legal challenges to that order. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967).

Moreover, the Sixth Circuit's approach is unduly oppressive because it disregards the immediate hardship for litigants who are thus obliged to suffer the obloquy of being held in contempt. As Judge Haynsworth has aptly stated, no public or private litigant should be put to this choice:

> [A]ny litigant, private individual or public official, is entitled to a writ of mandamus to avoid an appearance to show cause why he should not be held in contempt of court when the underlying order of the Court is clearly erroneous and the refusal to comply with it has been both formal and respectful. . . . [C]ontempt proceedings . . . as a prerequisite to appellate review of the order would be such a hardship upon any litigant or witness that resort to a petition for mandamus or prohibition ought to be permitted.

Hemphill, 369 F.2d at 543. Thus, the Sixth Circuit fails to recognize the practical costs that its approach would impose upon litigants who simply wish in good faith to preserve their rights, without being branded as criminals or engaging in sanctionable conduct. By contrast, in other contexts this Court has recognized that even the imminent *threat* of criminal prosecution presents sufficient harm to confer standing to bring lawsuits and raise legal claims that otherwise would be barred at the jurisdictional threshold. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 10-14 (1972); *see also O'Shea v. Littleton*, 414 U.S. 488, 498 (1974).

In addition, even if a party were able to stand the pressure of incurring contempt sanctions and seeking later review of any such order, this Court has indicated that such an oppressive judicial regime would raise serious due process concerns. In *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920), for example, the Court considered a statutory scheme whereby the only mechanism available for challenging certain rate orders was to stand in contempt of the law and incur cumulative penalties that mounted with each passing day. Recognizing that the obligatory regime of cumulative penalties was "such as might well deter even the boldest and most confident," the

Court unanimously held that "[o]bviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate." *Id.* at 336-337. *See also Ex parte Young*, 209 U.S. 123, 147 (1908) (same).

In short, the Sixth Circuit's problematic approach to the important procedural issues raised in this case warrants plenary review at this time.

III. THIS PETITION ADDRESSES IMPORTANT ISSUES OF JUDICIAL ADMINISTRATION THAT DIRECTLY AFFECT EVERY CIRCUIT COURT AND DISTRICT COURT NATIONWIDE.

The procedural issues that are squarely and cleanly raised by this petition for *certiorari* directly affect every circuit court and every district court nationwide. For purposes of sound judicial administration, it is critical that this Court intervene to establish a clear, uniform rule governing the proper relationship between the trial courts and the reviewing courts in terms of how a party may seek to vindicate a rightful claim of attorney-client privilege.

The issues raised in this case are especially important because they involve basic and systemic protection for the attorney-client privilege. It is well established in the Anglo-American legal system that the privilege is honored because it serves as an essential means to "promote broader public interests in the observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389. Because it is "the oldest privilege protecting confidential communications," it "is also one of the most sacred and absolute." *Coleman v. American Broad. Co.*, 106 F.R.D. 201, 204 (D.D.C. 1985). Courts have commonly recognized that the wrongful disclosure of privileged materials causes irreparable harm and thus that specific procedural avenues must remain available to allow meaningful review of judicial orders that threaten to accomplish this unjust result. *See, e.g., In re Ford Motor Co.*, 110 F.3d at 963-64 (party would be "irremediably disadvantaged by erroneous disclosure" of privileged communications); *Harper & Row*, 423 F.2d at 492 (same);

Admiral Ins. Co., 881 F.2d at 1490-92 (granting mandamus relief to protect the attorney-client privilege because review was not available by any other means, since party may not immediately appeal a civil contempt order and irreparable harm can result from forced disclosure of privileged material). *Certiorari* review is warranted in this case to clarify the proper procedures that are to be followed by litigants and the lower federal courts in ensuring appropriate protection for the attorney-client privilege.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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